

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

SEAFOOD PEDDLER OF SAN
RAFAEL, INC., dba SEAFOOD
PEDDLER; ALPHONSE SILVESTRI;
RICHARD MAYFIELD; FIDEL
CHACON,

Defendants.

Case No. 12-cv-00116 WHO (NC)

**ORDER DENYING DEFENDANTS'
REQUESTS TO COMPEL
ADDITIONAL DISCOVERY**

Re: Dkt. 203, 212, 215

This discovery order addresses Seafood Peddler's request to compel additional discovery in this labor case. Specifically, Seafood Peddler seeks (1) more depositions of its former employees so that it may ask them about any U-visa applications they made; and (2) supplemental interrogatory responses from the Secretary concerning his calculation of alleged cash payments made by Seafood Peddler. In considering both requests, the Court is aware that the deadline for fact discovery has passed, the deadline for filing summary judgment motions is April 21, and trial is scheduled for August 2014. Dkt. 191. Because Seafood Peddler does not establish good cause to compel additional discovery, the requests for relief are DENIED.

1 **I. Procedural History**

2 This discovery order is written in summary form, as the parties are familiar with
3 the case history and the discovery issues presented. The Court held a discovery hearing
4 on February 26, 2014, after which the Secretary filed a supplemental interrogatory
5 response to request number 7. Dkt. 215. Both parties submitted extensive excerpts of
6 relevant deposition transcripts. Dkt. 205, 210. The Court has reviewed all the information
7 submitted.

8 **II. Analysis**

9 **A. Deposition Questions About U-Visas**

10 In a letter brief docketed at 203, Seafood Peddler seeks to compel additional
11 deposition testimony and documents from six of its former employees concerning
12 whether they applied for U-visas. A footnote states that Seafood Peddler desires an order
13 that would apply to all fourteen former-employee witnesses, not just the six that were
14 deposed. Dkt. 203 at n.3. The preliminary question presented is whether the Secretary
15 properly instructed witnesses not to answer deposition questions about whether they had
16 applied for U-visas.

17 As an illustration, at the deposition of Luis Sandoval, Seafood Peddler's counsel
18 asked if the witness had been "promised a U visa" before going to a July 2011 meeting
19 with the Department of Labor. Sandoval Dep. at 12:27:58, Dkt. 211-2. The Secretary's
20 counsel objected and instructed the witness not to answer: "Objection. Do not answer -- I
21 am directing the witness not to answer the question. I will also state for the record that
22 there is a protective order in place barring the questions into U visas." *Id.* at 12:28:13.

23 The underpinning of the Secretary's objection are three rulings from this Court.
24 On March 29, 2013, Judge Phyllis J. Hamilton ruled that defendants may not ask any
25 witness what their immigration status is, but may ask indirect questions that may have
26 some bearing on immigration status. Dkt. 92 at 3.

27 On September 10, 2013, this Court ordered:

28 "In conclusion, defendants may not ask questions of witnesses regarding U

1 Visas unless (1) there is a factual basis showing that plaintiff offered,
2 provided, or was requested to provide, U Visa certification to any Seafood
3 Peddler employee in connection with the investigation or prosecution of this
4 case; (2) that employee's testimony will be relied upon by plaintiff in this
5 case; and (3) the employee is not a U Visa beneficiary within the meaning
6 of § 1367(a)(2)." Dkt. 162.

7 Then, on October 2, 2013, Judge William H. Orrick affirmed the September 10
8 discovery order, commenting that "The defendants are entitled to prepare for trial
9 knowing all discoverable information, including impeachment evidence, and should have
10 the opportunity to explore those issues with the witnesses in this case." Dkt. 181 at 4.

11 The Court denies Seafood Peddler's request for four reasons.

12 First, there is no factual record presented that plaintiff offered, provided, or was
13 requested to provide a U-visa certification to any Seafood Peddler employee in
14 connection with the investigation or prosecution of this case. Dkt. 162.

15 Second, two of the employee witnesses did answer deposition questions about U-
16 visas and denied that they had been offered or promised a U-visa.

17 Third, Seafood Peddler squandered its opportunity to discover relevant information
18 with deposition questions that frequently were sloppy, argumentative, or both. For
19 illustration, Seafood Peddler's counsel asked witness Sergio Mejia: "Is it possible that
20 you came here today to tell the, quote, truth, close quote, because you received a u. visa to
21 cooperate with a government investigation?" Mejia Dep. at 15:01:16, Dkt. 211-4.

22 And finally, Seafood Peddler was not diligent in waiting to challenge the
23 deposition objections until after the close of fact discovery. The Court now must consider
24 the benefit of further discovery against the burden to six witnesses of being re-deposed.
25 Having considered the speculative basis for Seafood Peddler's request, the Court
26 determines that further discovery is not warranted.

1 **B. Interrogatory Requests**

2 Next, in a letter brief docketed at 212, defendants request an order compelling
3 supplemental interrogatory responses to requests numbers 4, 7, 9, and 13-18.

4 Interrogatory number 7 asks for the identity of the DOL source for a January 14,
5 2012 news article about the case. The Court finds that the Secretary's supplemental
6 response is sufficient to respond to the interrogatory.

7 Interrogatories 4, 9 and 13-18 all request the Secretary's calculation of hours
8 worked and his contention as to how much cash was paid to Seafood Peddler's employees
9 during the relevant time period. Significantly, under the *Mt. Clemens Pottery* standard,
10 where as here an employer's record keeping is inadequate, inferential representative
11 testimony is permitted. *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988)
12 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). As a result, the
13 Court finds that the Secretary's interrogatory responses are sufficient and that the
14 Secretary need not specify the "exact cash sum" that each employee received.

15 **C. Discovery Is Closed**

16 In the letter briefs, in the deposition transcripts, and at hearing, Seafood Peddler
17 has asserted various other deficiencies in the Secretary's responses. For example, Mr.
18 Eytan's declaration highlights depositions where witnesses pleaded the Fifth Amendment
19 and did not answer questions about taxes. Dkt. 205 at 3.

20 The Court has considered these alleged transgressions and finds that Seafood
21 Peddler has not established good cause to re-open fact discovery. Fed. R. Civ. P.
22 16(b)(4); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992) (good
23 cause needed to modify pretrial schedule). As Seafood Peddler has failed to establish
24 good cause, the request for further discovery is DENIED. Any party may object to this
25 non-dispositive discovery order within 14 days under Fed. R. Civ. P. 72(a).

26 Date: April 18, 2014

27 
28 NATHANAEL M. COUSINS
United States Magistrate Judge